to a strong *prima facie* case that an offence against one or more of the Federated Malay States Enactments has been committed, it is undesirable to make use of the somewhat "extensive and arbitrary" powers conferred on the police by this section 35(i) of our Minor Offences Enactment.

Appeal dismissed.

ITAM JAMALUDIN v. SAPIAH

[A.C.J. (Aitken J.) August 24, 1936]
[Perak Civil Appeal No. 13 of 1936]

Land Code (Cap. 138), s.107 — Scope and meaning of s.107.

The provisions of section 107 of the Land Code (Cap. 138) do not allow an unregistered and unregistrable memorandum of transfer to be treated as effectual to deprive a registered proprietor of his indefeasible title. They are only intended to provide a simple procedure for rectifying errors on the face of the register which have arisen owing to —

(a) fraud or misrepresentation on the part of the registered proprietor, chargee or lessee, or

(b) registration of a forged instrument, or of an insufficient or void instrument, or

(c) the defeat of a proprietor's title by operation of law, or

(d) some mistake upon the part of the proper registering authority.

APPEAL from Collector of Land Revenue.

M. S. Mahendran for the objector-appellant.

Applicant-respondent in person.

Cur. Adv. Vult.

Aitken J.: The facts out of which this appeal arises are simple and not in dispute. The applicant-respondent is the widow of one Din bin Aripen, late of Tapah, who died on the 1st of November, 1935, and the objector-appellant is a brother of the deceased. On the 19th of August, 1935, the late Din bin Aripen and the applicant appeared before the Assistant Collector of Land Revenue, Batang Padang, and duly executed a memorandum of transfer in the statutory form which, omitting the purely formal parts, reads as follows:—

"I, Din bin Aripen, of Tapah being registered as the proprietor subject to the leases charges or other registered interests stated in the document of title thereto of the whole interest of the land held under Entry in the Mukim Register No. 1817 for Lot No. 1900 in the Mukim of Batang Padang in the district of Batang Padang in area 4 acres in consideration of the sum of dollars five hundred only ($500) paid to me by Sapiah binti Dera as trustee of Ramlah binti Din of Tapah the receipt of which sum I do hereby acknowledge do hereby transfer to the said Sapiah binti Dera as trustee of Ramlah binti Din of Tapah all my right title and interest in the said land."

It seems to be clear that the late Din bin Aripen was desirous of providing for his daughter (or adopted daughter) Ramlah binti Din, who was then a child of 14 years of age, and executed this transfer with that object in view: the real consideration was not $500 but natural love and affection. On the same date, but later in point of time, the applicant executed another document before the same Assistant Collector of Land Revenue whereby she declared that she held the land so transferred to her in trust for Ramlah binti Din and would transfer it to the latter when she attained her majority. One of the two persons who identified the late Din bin Aripen and the applicant to the Assistant Collector of Land Revenue at the time of the execution of this transfer is a certain Jamaludin bin Tapah, and after the execution of this transfer and declaration of trust the applicant handed both documents over to him and $16 in cash, with a request that he would have them both properly stamped and the first duly registered and the second duly deposited. She was probably constrained to entrust those very important matters to Jamaludin because the late Din bin Aripen was very ill at the time and required her [277] attention. Most unfortunately Jamaludin proved to be entirely untrustworthy, and when Din bin Aripen died on the 1st of November, 1935, it was discovered that the memorandum of transfer had not been registered. Although this memorandum of transfer was otherwise perfectly fit for registration, the transferor's death prior to presentation rendered such registration impossible in view of the provisions of section 85(ii) of the Land Code. In these circumstances the applicant applied to the Collector of Land Revenue, Batang Padang, to be registered as the proprietor of the land held under Entry in the Mukim Register No. 1817 for Lot No. 1900 in the Mukim of Batang Padang in trust for the child Ramlah binti Din. Her application duly came on for hearing before the Collector on the 1st of May, 1936, in the presence of the objector who gave notice of his objection at the very commencement of the proceedings, and after one somewhat length adjournment to enable the applicant to call as a witness Jamaludin bin Duaris, the man whose misconduct has caused all this trouble, the Collector gave his decision on the 5th of June, 1936, in favour of the applicant. From this decision the objector has appealed to me in accordance with the terms of section 170(xii) of the Land Code. [277]

In his grounds of judgment, after remarking that the objector had not challenged in any way the execution of the transfer and declaration of trust of the 19th of August, 1935, the Collector continued as follows:—

"The objector, Itam Jamaludin bin Ariffin in his statement states nothing more than he is a brother of the deceased and therefore according to Mohammadan Law (Hukom Shara'yah) he is entitled to a share in any property left by the deceased: deceased died without leaving any beneficiary by whom his claim is debarred. But since the land, the only property of the deceased, was already transferred I take it that the deceased had in effect, no property left by him. And because the deceased left no property so Itam Jamaludin bin Ariffin has nothing to claim.

It may also be noted that the deceased left a sister and three other brothers now living beside the objector, but none of them came forward to object this claim.

Taking that the transfer was in effect valid, I therefore ordered that the land held under E.M.R. 1817 Mukim of Batang Padang be registered in the name of Sapiah binti Dera as trustee of Ramlah binti Din."

It is thus apparent that the Collector's decision is based on his view that the transfer of the 19th of August, 1935, is "in effect valid."

Now my sympathy in this unfortunate affair is entirely and sincerely with the applicant and her daughter Ramlah binti Din, and I have tried hard to discover some ground on which I could dismiss this appeal. But a prolonged and careful study of the

provisions of the Land Code has only served to convince me that this appeal must be allowed and the Collector's order set aside for the following reasons: All land which is comprised in any entry in the Mukim Register is subject to the provisions of the Land Code, and is not capable of being transferred, transmitted, charged or otherwise dealt with, except in accordance with those provisions (section 55). What are those provisions in relation to a transfer? They are surely that any such transfer must, if it is to be recognised as having any validity, be (1) evidence by a memorandum of transfer duly executed in the prescribed form, and (2) recorded by the proper registering authority in the appropriate register: See definition of proprietor in section 2, and sections 42, 96, 110 and 113. Every one is agreed that the memorandum of transfer of the 19th of August, 1935, was duly executed in the prescribed form, but every one is also agreed that it cannot be registered in view of the provisions of section 85(ii). How, then, can it be treated as "in effect valid," when under the provisions of section 96 "no instrument until registered.....shall be effectual to pass any land or any interest therein"? The only answer I can think of is that it cannot be so treated, and in my opinion the only person who can now apply to be registered as the proprietor of the lot of land in question is the legal personal representative (when appointed) of the late Din bin Aripen: See section 155.

This really disposes of the matter before me, but I can imagine a reasonably puzzled Collector of Land Revenue saying, "Yes, I can understand a decision that an unregistered and unregistrable memorandum of transfer is ineffectual to pass this land or any interest in it, but what does sub-section (i) of section 107 of the Land Code mean and what 'rights or interests' can be rendered effectual under that section?" This is not an easy question to answer, but since I have spent several hours endeavouring to form some clear idea as to the scope and meaning of section 107, and since counsel has specially asked me to deal with it, I feel that I ought to attempt an answer. As a result, then, of my endeavours I have come to the conclusion that section 107 of the Land Code is only intended to provide a simple procedure for rectifying errors on the face of the register which have arisen owing to —

(a) fraud or misrepresentation on the part of the registered proprietor, chargee or lessee, or

[278] (b) registration of a forged instrument, or of an insufficient or void instrument, or

(c) the defeat of a proprietor's title by operation of law, or

(d) some mistake upon the part of the proper registering authority.

The effect of fraud and misrepresentation, forgery and the registration of an instrument or void instrument is dealt with in sub-sections (ii), (iii) and (iv) of section 42, and sub-section (i) of the same section provides that the title of a proprietor, chargee or lessee shall be indefeasible except as provided in those three sub-sections and in cases where it is defeated by opration of law [sub-section (iv)]. The (a), (b), and (c) above are thus supported by the express provisions of section 42 of the Land Code; and though section 230(e) enables the proper registering authority, upon such evidence as shall appear to him sufficient, to correct errors in documents of title or in memorials &c., it does not say how any person whose right or interest in the land has suffered by such an error is to apply to have the same corrected. I therefore apprehend that he, too, may apply to the Collector under section 107(i) if the value of the land in question does not exceed $3,000.

Time alone can show whether the views I have just expressed in regard to the scope and meaning of section 107 of the Land Code are correct. I feel no great confidence in them since they are entirely my own and owe nothing to the suggestions or arguments of learned counsel. I do feel confident, however, that section 107 does not allow an unregistered and unregistrable memorandum of transfer to be treated as effectual to deprive a registered proprietor of his "indefeasible" title and to confer another "indefeasible" title on someone else, as was done in this matter, and for that terse reason I must allow this appeal and with costs. It may be that the memorandum of transfer of the 19th of August, 1935, though deprived of any effect as a transfer by sections 85(ii) and 96 of the Land Code, may be good as a contract, and that an action for the specific performance of the same may lie against the legal personal representative of the late Din bin Aripen notwithstanding section 4(c) of the Specific Relief Act: See *Loke Yew* v. *Port Swettenham Rubber Co.*, [1913] App. Cas. 491, 500; and *Haji Abdul Rahman* v. *Mahomed Hassan*, [1917] App. Cas. 209, 214. But that very difficult question does not arise for consideration in this appeal.

Appeal allowed.

M. C. CORBETT v. IPOH TIN DREDGING, LTD.

[O.C.J. (Aitken J.) August 24, 1936]
[Perak Civil Suit No. 337 of 1934]

Costs — Taxation — Rule Committee (Supreme Court) Enactment, (Cap. 13), 1932, Rule No. 4, sub-r.71 and Schedule, items 208 and 258 — Discretion of Registrar as to quantum.

Under items 208 and 258 in the Schedule to 1932 Rule No. 4 made under the Rule Committee (Supreme Court) Enactment (Cap. 13), the quantum of costs is in the discretion of the Registrar and in an objection under 1932 Rule No. 4, sub-rule 71 the Judge will not vary the amount allowed on taxation unless the Registrar has made an obvious mistake, or has exercised his discretion capriciously or mischievously.

L. T. Williams for the plaintiff.

H. R. Rix for the defendants.

Aitken J.: This case was undoubtedly a difficult one, of great importance to the parties concerned and involving much labour on the part of all learned counsel engaged therein, whether as solicitors, or as advocates, or in both those capacities. Its trial before Howes J. occupied six and a half days in June and July, 1935, and on most of the issues of law and fact then placed before him the learned Judge found in the plaintiff's favour and adjudged that the defendant company should pay him seven eighths of his taxed costs. There was no appeal.